is and was shown in the evidence before the trial court that Petitioner is the only operator of a mass transit system in Kansas City and holds a Certificate from the State of Missouri as such (R. 19, 20). Furthermore, the evidence showed that in 1961 (after the date set forth at R. 186) Petitioner sought authority from the Missouri Public Service Commission "for the transfer of all franchises, permits and rights to operate transit service in the Greater Kansas City Area." (Plaintiff's Exhibit 5, page 8). No arbitrary distinction is made here in that Petitioner as the evidence shows is the only operator of a mass transit system in Kansas City. The other motor buses and common carriers of passengers it refers to are all intercity motor carriers.

Petitioner's argument erroneously assumes that the so-called "exclusive use" of the viaduct is an unconstitutional burden on interstate commerce. No such exclusive use was granted it by the Contract. The Contract specifically states that this viaduct shall be "the property of Kansas City, Missouri, as and for a public highway." (Plaintiff's Exhibit 1, page 6). By the Contract, Petitioner was granted an exclusive right of way on the viaduct for its tracks. However, when it converted from streetcars, it voluntarily surrendered the exclusive right of way without amending its other contractual obligations (Plaintiff's Exhibits 12 and 13). At the time of trial, Petitioner was still employing said viaduct in the operation of an urban mass transit system (Plaintiff's Exhibit 11) and not as an intercity common carrier of passengers as it argues. The evidence in this case does not even raise the question of this agreement being a burden on interstate commerce.

In this connection, and in connection with the argument presented in Point 3 of Petitioner's Argument the Missouri Supreme Court cited (R. 1-169, 170) its prior decision in the case of *Kansas City* v. *Kansas City Terminal Railway*, 324 Mo. 882, 25 S. W. 2d 1055, and held that con-

struction of contracts and defenses thereto are matters of state law and that since the Contract had been voluntarily entered into no constitutional rights are involved. In the Terminal Case the Court had before it an interstate rail carrier subject to the jurisdiction of the Interstate Commerce Commission. On the other hand Petitioner is generally exempt from Interstate Commerce Act (49 U.S.C., Section 303(b)(8)).

It should be pointed out that in the case of *Kansas City Terminal Railway Company* v. *Kansas City Transit*, 359 S. W. 2d 698, cited by the Missouri Supreme Court (R. 170), this Court denied a Petition for Writ of Certiorari to the Supreme Court of Missouri, 371 U.S. 968. In its Petition filed therein, Petitioner set forth the same grounds as here urged for granting the Writ (October Term 1962, No. 642).

CONCLUSION

This is an action on a contract voluntarily entered into by the parties and involves the construction thereof and presents no substantial federal question or any right, privilege or immunity under the Constitution. Therefore, the Petition for a Writ of Certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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